FILED
NOV 29 1905
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In the Supreme Court of the United States.

OCTOBER TERM, 1905.

THE RUSSIAN-AMERICAN PACKING COMPANY
v.
THE UNITED STATES.

No. 85.

THE ROYAL PACKING COMPANY
v.
THE UNITED STATES.

No. 86.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

LOUIS A. PRADT,
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Special Attorney.

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STATEMENT.

In the year 1889 the appellant, The Russian-American Packing Company, was incorporated under the laws of the State of California for the purpose of conducting the business of canning and packing salmon on the island of Afognak, in the Territory of Alaska.

For this purpose, in the spring of that year, the company took possession of a suitable site upon said island, comprising about 159.52 acres of vacant, unoccupied

public land, erected and installed thereon its cannery, buildings, and other plant, and proceeded to carry on the business for which it had been incorporated.

Three years later—on April 1, 1892—it made application to the United States marshal and *ex officio* surveyor-general of Alaska, under the provisions of an act of Congress approved March 3, 1891, for the survey of the land thus selected and occupied by it, and, in response to a notification from that officer, deposited in the United States subtreasury at San Francisco, as required by said act, the sum of $433.80, being the estimated cost of such survey. Thereupon the *ex officio* surveyor-general caused a survey of the ground so entered upon to be made.

Prior to the approval of this survey by the *ex officio* surveyor-general, the President of the United States, on December 24, 1892, issued a proclamation declaring the whole island of Afognak, including the site occupied and improved by the appellant, reserved from occupation and sale for the purpose of establishing thereon United States fish-culture stations, and warning all persons to depart therefrom. (27 Stats., p. 1052.)

Subsequent to this proclamation by the President, on March 15, 1893, the survey previously authorized by the *ex officio* surveyor-general of Alaska was approved and forwarded by that officer to the Commissioner of the General Land Office for approval, in conformity with the terms of the statute.

In July, 1898, the agents of the United States for the protection of salmon fisheries officially informed

the agents of the appellant on said island of the proclamation by the President, and ordered the appellant to depart therefrom, which it did, abandoning its property thereon, and has not since returned nor attempted to remove its property from said island, nor has objection ever been raised by the United States to such removal.

On January 15, 1895, the survey forwarded by the *ex officio* surveyor-general of Alaska was rejected by the Commissioner of the General Land Office for the reason that such survey did not conform to the requirements of the statute in that the tract surveyed was not in square form, and for the further reason that the whole of Afognak Island, its bays, rocks, and territorial waters, had been made a public reservation by the proclamation of the President on December 24, 1892. The marshal was directed to notify the parties in interest of their right to appeal from this decision within sixty days, but no appeal was taken by the appellant.

In April, 1897, the appellant filed its petition in the Court of Claims alleging that the act of Congress approved May 17, 1884, was in the nature of a contract by the United States with appellant that it should not be disturbed in its possession and should be allowed to acquire title to said tract of land; that by reason of the breach of said contract, by the United States, the appellant had sustained the following losses:

Trade and business	$100,000.00
Plant and equipment	46,000.00
Deposit for estimated cost of survey	433.80

The item for loss of prospective business was not pressed in the Court of Claims, and, not having been included in the assignment of errors to this court, has apparently been abandoned.

The Court of Claims, in an opinion by Peelle, J. (Record, p. 7), found, as a conclusion of law, that the appellant was not entitled to recover for the value of the improvements erected by it upon the land described, nor for the loss of the profits arising from its removal from said land pursuant to the proclamation of the President, but gave judgment for the appellant in the sum of $433.80, deposited in payment of said survey. Thereupon an appeal was taken to this court.

The facts found by the Court of Claims in these two cases and the questions of law involved are the same, except that in No. 86, the case of *The Royal Packing Company* v. *The United States*, the amount claimed was $119,045.26 and the judgment entered was for $367.35. This statement and brief is intended, therefore, to apply to both cases.

ARGUMENT.

This is an action to recover the sum of $46,433.80 as damages to the appellant arising from the refusal of the United States to permit it to purchase 159.52 acres of land on Afognak Island, in the Territory of Alaska, at $2.50 per acre, upon which it had erected a plant for the purpose of canning salmon, and compelling it to remove from said island because of a proclamation by the President of the United States creating the whole of the island a public reservation.

The appellant contends that by virtue of the act of May 17, 1884 (23 Stats., 26), a contract arose whereby the appellant was given permission to enter upon and occupy said lands with the right to purchase the same from the Government upon terms to be thereafter fixed by Congress; that, having complied with the requirements of the act of March 3, 1891 (26 Stat., 1100), as far as was then possible, the appellant became entitled to have the land surveyed and a patent issued to it, and that by the withdrawal and reservation of such lands for public purposes this contract was broken, to the appellant's damage in the amount stated.

The basis for this contention is section 8 of the act of 1884 (supra), which provides:

* * * * * * *

> That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation, or now claimed by them, but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress. * * * But nothing contained in this act shall be construed to put in force in said district the general land laws of the United States.

It will be recalled that the appellant company did not come into existence nor take possession of the lands on Afognak Island until 1889, or five years after the date of the passage of the above act.

The Court of Claims found that appellant's possession was without authority or license from the United States, other than whatever right it may have had under the act of May 17, 1884. (Record, p. 5.)

In view of this finding, it is not necessary to ascertain or determine what the rights of the appellant might have been had this company been in the actual *use and occupation* of said lands or had laid claim to the same at the time the act was passed. The question is confined to the nature of the obligation assumed by the United States toward the appellant by reason of its settlement upon this tract subsequent to May 17, 1884.

It is perfectly manifest that the section quoted did not in any manner create a contract on the part of the United States to sell land to anybody, should it, by subsequent legislation, determine not to do so. Much less did it become bound to sell to those who might settle in Alaska long after the date of its passage. The provision is a mere permission to persons theretofore occupying public lands without right, authority, or license from the United States, to remain upon them unmolested until Congress should see fit to further legislate upon the subject. This permission is restricted in express terms to Indians and other persons in possession of lands actually in use or occupation at that date.

In 1884 the Territory of Alaska was practically an unknown land. While the benefits of civil government were extended to that Territory, it was not known at that time by Congress what portions of its vast domain might in future be required by the United States for public purposes, and so Congress wisely determined not to part with title to any lands therein until after further investigation of existing conditions had afforded

a more intelligent basis for its action. Congress therefore provided in the same act by section 12—

> That the Secretary of the Interior shall select two of the officers to be appointed under this act, who, together with the governor, shall constitute a commission to examine into and report upon the condition of the Indians residing in said Territory, what lands, if any, should be reserved for their use, what provision shall be made for their education, what rights by occupation of settlers should be recognized and all other facts that may be necessary to enable Congress to determine what limitations or conditions should be imposed when the land laws of the United States shall be extended to said district; and to defray the expenses of said commission the sum of two thousand dollars is hereby appropriated out of any moneys in the Treasury not otherwise appropriated.

It is difficult to perceive how the mere fact of the entry by appellant upon these lands five years after the passage of this act created a contractual obligation under said act on the part of the United States to convey title to the same or to respond in damages for failure so to do.

The appellant relies, however, upon the language used by the District Court of Alaska in the case of *Young* v. *Goldsteen* (97 Fed. Rep., 303), where, in passing upon the act of 1884, it was said:

> It is not too broad a construction of the language used to apply it to those who, in good faith, were the first to take up, occupy, and

> improve the public lands since that date. With the absolute guaranty of possession to those in possession of lands prior to May 17, 1884, and with the laws relating to mineral lands only having been extended to Alaska, all persons had a right to expect protection from Congress if they were the first in point of time to go upon the public domain, and occupy and improve the same, even though they went there after May 17, 1884.

This dictum is wholly without foundation. To say that under this act "all persons had a right to expect protection from Congress if they were first in point of time to go upon the public domain, and occupy and improve the same, even though they went there after May 17, 1884," is not merely *broad construction*, it is plain addition. There is absolutely nothing in the act that can be tortured into an intention by Congress to invite or encourage settlement upon the public lands of Alaska. On the contrary, it is expressly declared that "nothing contained in this act shall be construed to put in force in said district the general land laws of the United States."

Moreover, in the case cited the court was passing upon the sufficiency of demurrers filed in various actions, wherein the defendant, ~~in possession~~ under a mineral claim, was sued at law under certain statutory provisions by a number of parties claiming the same land by adverse possession. The case called for nothing more than a determination of the proper form of procedure, and that was the point decided in the

case, the court merely sustaining the demurrers on the ground that the plaintiffs were in possession of the premises, and therefore suits in equity to quiet title should have been brought. So this dictum was *obiter*.

From these facts it seems plain that when the appellant in this case occupied these lands in the spring of 1889 and erected its improvements thereon it did so not only without authority or license under the act of 1884, but in the face of an express warning by Congress that nothing in the act should be construed as a promise or agreement to put in force in that district the general land laws of the United States.

II.

THE ACT OF MARCH 3, 1891.

But the appellant maintains that it is entitled to recover in this case, irrespective of the act of 1884, *supra*, by virtue of the act of March 3, 1891 (26 Stat., 1100), the pertinent provisions of which follow:

> SEC. 12. That any citizen of the United States twenty-one years of age, and any association of such citizens, and any corporation incorporated under the laws of the United States or of any State or Territory of the United States now authorized by law to hold lands in the Territories now or hereafter in possession of and occupying public lands in Alaska for the purpose of trade or manufactures, may purchase not exceeding one hundred and sixty acres, to be taken as near as practicable in a square form, of such land at two dollars and fifty cents per

acre: *Provided*, That in case more than one person, association, or corporation shall claim the same tract of land, the person, association, or corporation having the prior claim by reason of possession and continued occupation shall be entitled to purchase the same; but the entry of no person, association, or corporation shall include improvements made by or in possession of another prior to the passage of this act.

SEC. 13. That it shall be the duty of any person, association, or corporation entitled to purchase land under this act to make an application to the United States marshal, *ex officio* surveyor-general, of Alaska for an estimate of the cost of making a survey of the lands occupied by such person, association, or corporation, and the cost of the clerical work necessary to be done in the office of the said United States marshal, *ex officio* surveyor-general; and on the receipt of such estimate from the United States marshal, *ex officio* surveyor-general, the said person, association, or corporation shall deposit the amount in the United States depository, as is required by section numbered 2401, Revised Statutes, relating to deposits for surveys.

That on the receipt by the United States marshal, *ex officio* surveyor-general, of the said certificates of deposit, he shall employ a competent person to make such survey, under such rules and regulations as may be adopted by the Secretary of the Interior, who shall make his return of his field notes and maps to the office of the said United States marshal, *ex officio* surveyor-general; and the said United States

marshal, *ex officio* surveyor-general, shall cause the said field notes and plats of such survey to be examined, and, if correct, approve the same, and shall transmit certified copies of such maps and plats to the office of the Commissioner of the General Land Office.

That when said notes and plats of said survey shall have been approved by the said Commissioner of the General Land Office, he shall notify such person, association, or corporation, who shall then, within six months after such notice, pay said United States marshal, *ex officio* surveyor-general, for such land, and patent shall issue for the same.

SEC. 14. That none of the provisions of the last two preceding sections of this act shall be so construed as to warrant the sale of any lands belonging to the United States which shall contain coal or the precious metals, or any town site, or which shall be occupied by the United States for public purposes, or which shall be reserved for such purposes, or to which the natives of Alaska have prior rights by virtue of actual occupation, or which shall be selected by the United States Commissioner of Fish and Fisheries on the islands of Kadiak and Afognak for the purpose of establishing fish-culture stations. * * * and the United States reserves, and there shall be reserved in all patents issued under the provisions of the last two preceding sections the right of the United States to regulate the taking of salmon and to do all things necessary to protect and prevent the destruction of salmon in all the waters of the lands granted frequented by salmon.

SEC. 24. That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof.

The authority of the President by proclamation to withdraw the whole of Afognak Island from sale and to set it apart for public purposes being especially conferred by sections 14 and 24, above quoted, the validity of his act can not be questioned. The appellant and all others were thereby expressly warned by these sections that land selected on that island might at any time be required for public purposes, and it therefore initiated its claim with full knowledge of this condition of affairs.

Appellant insists, however, that all acts of Congress providing for the disposal of vacant public lands are in the nature of contracts obligating the United States to grant the claimant a patent to the land whenever he has complied with the provisions of the law in that particular case, and that notwithstanding the notice contained in sections 14 and 24, above quoted, when it, in strict accord with the provisions of the act, applied to the *ex officio* surveyor-general for survey of the lands and deposited a sum to cover the estimated cost of such survey, said sum being greater in amount

than the total price of the land, absolutely nothing further remained to be done on its part under the act, and, therefore, the United States became bound by contract to issue the patent in the same manner as though the survey had been finally approved by the Commissioner of the General Land Office, final entry made, and the price of the land formally paid and accepted.

Thus arises the question whether the acts of the appellant in the premises created such a contract as divested the President of the authority conferred by Congress to withdraw the lands from sale.

In the Yosemite Valley case (15 Wall., 77–87) this court held, following the case of *Frisbie* v. *Whitney* (9 Wall., 187–194):

> That under the preemption laws mere occupation and improvement of any portion of the public lands of the United States, with a view to preemption, do not confer upon the settler any right in the land occupied, *as against the United States*, or impair in any respect the power of Congress to dispose of the land in any way it may deem proper, and that the power of regulation and disposition conferred upon Congress by the Constitution only ceases when all the preliminary acts prescribed by those laws for the acquisition of the title, including the payment of the price of the land, have been performed by the settler. When these prerequisites have been complied with the settler for the first time acquires a vested interest in the premises occupied by him, of which

he can not be subsequently deprived. He is then entitled to a certificate of entry from the local land officers, and ultimately to a patent for the land from the United States. Until such payment and entry the acts of Congress give to the settler only a privilege of pre-emption in case the lands are offered for sale in the usual manner; that is, the privilege to purchase them in that event in preference to others. The United States by those acts enter into no contract with the settler, and incur no obligation to anyone that the land occupied by him shall ever be put up for sale. They simply declare that in case any of their lands are thrown open for sale the privilege to purchase them in limited quantities, at fixed prices, shall be first given to parties who have settled upon and improved them. The legislation thus adopted for the benefit of settlers was not intended to deprive Congress of the power to make any other disposition of the lands before they are offered for sale, or to appropriate them to any public use.

The case of *United States* v. *Braddock* (50 Fed. Rep., 669) follows the Yosemite Valley case. It was a suit by the Government to restrain the defendant from cutting timber from a quarter section of public land. The defendant filed a crossbill, alleging that he had made application to purchase the land in question under the stone and timber act (20 Stats., p. 89), and had complied with all the statutory requirements in that respect, but upon tender of the purchase money the local land officers refused the tender and declined

to issue a certificate of entry and purchase because the land had been withdrawn from sale by Presidential proclamation, and it was held that the defendant had acquired no vested interest in the land and that the Government was entitled to withdraw it from sale.

See also 8 Opinions Attorney-General, 72; 10 id., 57, and 11 id., 462, quoted with approval in *Frisbie* v. *Whitney*, 9 Wall., 195.

The appellant endeavors to avoid the effect of these decisions by strenuously urging attention to the decision in the case of Lytle *v.* Arkansas (9 Howard, 333), which was founded upon the familiar principle that where one endeavors to do that upon which the acquisition of a right depends and is prevented by fault of the other side his right shall not be lost by his failure. But what was the right of appellant in this case? Under the decisions above quoted it was merely a right to purchase the lands in preference to others, providing a sale was made. The appellant's failure to obtain a patent was not occasioned by the fault or neglect of any officer of the United States. The claim was rejected simply because the lands sought had been withdrawn from settlement by the lawful exercise of express authority conferred by Congress and were therefore no longer open to sale.

As was said by this court in the Yosemite Valley case (supra), p. 93, in distinguishing that case from the case of *Lytle* v. *Arkansas:* (9 How. 333).

> The whole difficulty in the argument of defendant's counsel arises from his confounding

> the distinction made in all cases whenever necessary for their decision between the acquisition by the settler of a *legal right to the land* occupied by him as against the owner, the United States, and the acquisition by him of a *legal right as against other parties to be preferred in its purchase* when the United States have determined to sell. It seems to us little less than absurd to say that a settler, or any other person, by acquiring a right to be preferred in the purchase of property, providing a sale is made by the owner, thereby acquires the right to compel the owner to sell, or such an interest in the property as to deprive the owner of the power to control its disposition.

What are the facts upon which appellant relies in this case to vest in it a legal right to the land as against the United States? Merely an application to the *ex officio* surveyor-general for the survey of the lands and a deposit of money to pay the estimated cost of such survey. While it is true that the survey was actually made and the field notes and plats were approved and forwarded by the *ex officio* surveyor-general to the Commissioner of the General Land Office, yet the appellant acquired no greater legal right to the land by such act, because at that date, March 15, 1893, the power and authority of the surveyor-general had ceased to exist by virtue of the President's proclamation issued December 24, 1892, or four months prior to the date of such approval.

The appellant contends, however, that it had acquired a vested interest in the land that could not be

impaired by a subsequent withdrawal of the land from sale.

A similar contention was pressed upon this court in the case of *Rector* v. *Ashley* (6 Wall., 151), where it was said:

> But the rights of claimant are to be measured by the act of Congress, and not exclusively by what he may or may not be able to do; and if a sound construction of that act shows that he acquires no vested interest in the land until the officers of the Government have surveyed the land, and until that survey is filed in the office of the recorder and approved by him, then, as claimant's rights are created by that statute, they must be governed by its provisions, whether they be hard or lenient. It seems to us clear, from the foregoing cases, that the court intended to decide that until this was done the claimant acquired no vested right to the land; no title, legal or equitable.

To the same effect is the decision of this court in the case of *Campbell* v. *Wade* (132 U. S., 37):

> It was contended in the State courts, and the contention is renewed here, that the petitioner, by his application for a survey, had acquired a vested interest in the lands he desired to purchase which could not be impaired by their subsequent withdrawal from sale. This position is clearly untenable. The application was only one of different steps, all of which were necessary to be performed before the applicant could acquire any right against the State.
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> * * * * *

> The adjudications are numerous where the withdrawal from sale by the Government of lands previously opened to sale has been adjudged to put an end to proceedings instituted for their acquisition. Thus, under the preemption laws of the United States, large portions of the public domain are opened to settlement and sale, and parties having the requisite qualifications are allowed to acquire the title to tracts of a specific amount by occupation and improvement and their entry at the appropriate land office and payment of the prescribed price. But it has always been held that occupation and improvement of the tracts desired, with a view to preemption, though absolutely essential for that purpose, do not confer upon the settler any right in the land occupied as against the United States which could impair in any respect the power of Congress to withdraw the land from sale for the uses of the Government, or to dispose of the same to other parties.

To sustain the theory advanced in this case the appellant seeks to show a complete compliance with every step required by the terms of the act of 1891, including the payment of the purchase price of the land. For this purpose reference is made to the general circular issued by the Commissioner of the General Land Office, with the approval of the Secretary of the Interior, promulgating regulations for the guidance of the officers charged with the administration of the act and those seeking to acquire land thereunder,

the fifth paragraph of which states (12 Land Decisions, 583–592):

> The triplicate certificate of deposit will be receivable in payment to the extent of the amount of such certificate, for the land purchased, the surveying of which is paid for out of such deposit, as provided in section 2403 of the Revised Statutes.

Section 2403 of the Revised Statutes provides:

> Where settlers make deposits in accordance with the provisions of section twenty-four hundred and (*seven*) (one) the amount so deposited shall go in part payment for their land situated in the townships, the surveying of which is paid for out of such deposit.

The deposit which was thus made being in excess of the total price of the lands, it is alleged, constituted payment of the purchase price.

This contention is wholly without merit. The deposit was made, not as payment for the land, but solely to pay, first, the estimated cost of making the survey, and, second, the estimated cost of the clerical work necessary to be done in the office of the *ex officio* surveyor-general. This was the only object of the deposit, and it was required before the *ex officio* surveyor-general was empowered to even authorize the survey to be made. It is true that where the amount thus deposited was greater than the cost of the land, the triplicate certificate might thereafter at the final stage of the proceedings be surrendered in payment of the land, but it became available for this purpose only *after* all

the other requirements had been fully complied with under the act.

Fairly analyzed, there is but one question in this case, and that is as to the legal effect of the deposit made by the appellant of the estimated cost of the survey of the tract applied for by it. For, granting the full application of the statutes of 1884 and 1891, contended for by the appellant, it is clear, even by its own contention, that it acquired no vested right in the tract in question by virtue of these statutes alone, for the law governing the acquisition of the public domain by private parties has been so unmistakably laid down by this court that the appellant is forced to recognize that its claim must fail, unless it can establish that all essential steps required upon its application to purchase the tract occupied by it have been taken, including the payment of the purchase price thereof and its receipt by the United States.

The exigencies of its case being thus evident, there is nothing left for the appellant but to contend that the sum deposited by it as the estimated cost of the survey of the tract applied for subsequently assumed the character of payment for the tract, and furthermore that such payment must be deemed to have been accepted by the United States as such payment whilst its potency is such that the United States was divested of the title to the tract and the appellant vested with the same whether the Government would have it so or not. That it was a payment operating *ex proprio vigore*, so to speak.

In other words the contention comes to this, that a deposit of money made by an applicant for the purchase of public land to meet the costs of a survey of the tract becomes, if sufficient in amount, full payment for the tract, as soon as the survey is approved by the surveyor-general, without anything further, although the law requires that the survey be also approved by the Commissioner of the General Land Office, and even though, as in this case, the approval of the surveyor-general was made several months after the withdrawal of the tract for the purpose of public reservation by the President of the United States and in ignorance of such withdrawal, and despite the fact that the Commissioner of the General Land Office refused to approve the report of the survey because of such withdrawal by the President, and also because the survey was not in square form, as required by the statute. This contention may justly be termed preposterous.

The recovery sought in this case is the value of the building and plant placed upon this land by the appellant before the passage of the act of 1891. At that time, as has been shown, the appellant was in possession and occupation of the land without the slightest authority or license from the United States, and its improvements therefore had been erected without warrant of law and were at the entire risk of the appellant. The United States decided not to sell the land and in the exercise of lawful authority reserved it for public purposes. Certainly there can be no legal obligation rest-

ing upon the United States under these circumstances to pay for such improvements. Neither can an equitable or meritorious claim be raised, since the facts show that the unauthorized occupation of these lands, prior to the act of 1891, resulted in a profit of $65,000 to appellant from business there conducted by it, and the further sum of $35,000 from the same source in the year 1892.

The United States derived no benefit whatever from the erection of these buildings. The appellant company has not attempted to sell or otherwise dispose of or to remove the buildings from this land.

We respectfully insist that the claims of the appellants are without legal foundation and without merit, and that the judgments appealed from should be affirmed.

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